

# Employment Discrimination and Equal Opportunity in Supply and Service Contracts

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## Executive Order 11246, as amended (Parts II, III, and IV) (41 CFR Chapter 60, Parts 60-1, 60-2, 60-3, 60-20, and 60-50)

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### Who is Covered

Executive Order 11246 and its implementing regulations cover employers with federal contracts or subcontracts that exceed \$10,000 or that will (or can reasonably be expected to) accumulate to more than \$10,000 in any 12-month period.

Contracts covered by the Executive Order and regulations may be for the purchase, sale, or use of personal property, nonpersonal services, or both. In this context, the term “personal property” includes supplies and contracts for the use of real property, such as lease arrangements, unless the contract for the use of real property is *itself* considered real property (such as with easements). The term “nonpersonal services” includes services such as utilities, construction, transportation, research, insurance, and fund depository. Agreements in which the parties stand in the relationship of employer and employee are not covered.

The following types of contracts and subcontracts are *exempt* from the Executive Order:

- Those not exceeding \$10,000;
- Those for indefinite quantities, unless the purchaser has reason to believe that the cost in any one year will be over \$10,000; and
- Those for work that is performed outside the U.S. by employees who were not recruited in the U.S.

Specific exemptions may apply to the following:

- Contracts and subcontracts with certain religiously-oriented educational institutions;
- Contracts and subcontracts for work on or near Indian reservations;
- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of the Executive Order or the regulations with respect to the process of awarding the contract is essential to national security;

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- Specific contracts or subcontracts, if the Deputy Assistant Secretary decides that special circumstances in the national interest require such an exemption;
- Contractor facilities not related to contract performance, as determined by the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor's Employment Standards Administration (ESA); and
- Contracts and subcontracts with state or local governments, except for the specific government entity that participates in work on or under the contract.

Moreover, contractors or subcontractors that are religious entities may grant employment preferences to individuals of a particular religion to perform work connected with carrying out the activities of the religious entity.

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## Basic Provisions/Requirements

The Executive Order requires covered contractors and subcontractors to refrain from discrimination and to engage in affirmative steps to ensure that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, and/or national origin. Sexual harassment is a violation of the Executive Order.

The Order requires all covered contractors and subcontractors to include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The Order and the regulations provide the required language ([www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm](http://www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm)) for this clause.

The Department of Labor's regulations prohibit discrimination in such employment practices as recruitment, rates of pay, upgrading, layoff, promotion, and selection for training. Employers may not make distinctions based on race, color, religion, sex, or national origin in recruitment or advertising efforts, employment opportunities, wages, hours, job classifications, seniority, retirement ages, or job fringe benefits such as employer contributions to company pension or insurance plans. The regulations include other requirements, such as those summarized below.

Nonconstruction (supply and service) contractors and subcontractors that employ 50 or more persons and that also satisfy at least one of four additional criteria (e.g., having a federal contract of \$50,000 or more) must develop written affirmative action programs (AAPs). Usually an AAP must cover each of the contractor's establishments.

If a contractor wishes to establish an AAP other than by establishment, the contractor may reach agreement with OFCCP on the development and use of functional AAPs, which are organized along functional or business lines. The AAP is a management tool designed to encourage equal employment opportunity.

In general, the AAP will describe the policies, practices, and procedures that the contractor or subcontractor uses to ensure that all qualified applicants and employees receive equal opportunities for employment and advancement. If the contractor or subcontractor is not employing women or minorities at a rate to be expected given their availability in the relevant labor pool, the AAP will include specific practical steps to address the issue. Contractors with AAPs must implement them, keep them on file, and update them annually. Additional information on AAPs may be found on the Government Contractors, Affirmative Action Requirements Final Rule Web page ([www.dol.gov/esa/regs/fedreg/final/2000028693.htm](http://www.dol.gov/esa/regs/fedreg/final/2000028693.htm)).

Covered contractors and subcontractors, regardless of company size, may not use exclusionary policies that treat men and women differently. For example, a contractor

or subcontractor that hires or promotes a man who has young children cannot deny a job or a promotion to a woman because she has young children.

Covered contractors and subcontractors also may not depend on state “protective” laws to deny employment to qualified female applicants. Such “protective” laws include those prohibiting women from performing certain types of occupations, from working more than a certain number of hours, or from lifting more than a certain amount of weight.

Covered contractors and subcontractors that qualify as “employers” under Title VII of the Civil Rights Act of 1964 are required to comply with the Pregnancy Discrimination Act of 1978. Additional information on this law may be found on the Equal Employment Opportunity Commission’s Facts About Pregnancy Discrimination Web page at [www.eeoc.gov/facts/fs-preg.html](http://www.eeoc.gov/facts/fs-preg.html). All covered contractors and subcontractors must also provide equal fringe benefits, and make equal contributions for such benefits for men and women.

Moreover, employers are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against an individual for filing a complaint or participating in a proceeding under the Executive Order.

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## **Employee Rights**

Anyone has the right to file a complaint with OFCCP if he or she believes that a federal contractor or subcontractor has discriminated on the basis of race, color, religion, sex, or national origin. In most cases, complaints must be filed within 180 days of the discriminatory action. Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter.

The main telephone numbers for OFCCP’s national offices are 202–693–0101 and 202–693–1308 (TTY). Additional telephone numbers for OFCCP may be found at OFCCP’s Office Contact Web page ([www.dol.gov/esa/contacts/ofccp/ofcpckeyp.htm](http://www.dol.gov/esa/contacts/ofccp/ofcpckeyp.htm)).

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## **Compliance Assistance Available**

More detailed compliance assistance information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the OFCCP Web site ([www.dol.gov/esa/ofccp](http://www.dol.gov/esa/ofccp)) or by contacting OFCCP’s local offices ([www.dol.gov/esa/contacts/ofccp/ofcpckeyp.htm](http://www.dol.gov/esa/contacts/ofccp/ofcpckeyp.htm)). Further assistance is available from OFCCP’s Toll-Free Help Desk at 1–800–397–6251.

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## **Penalties/Sanctions**

OFCCP investigates for violations of the Executive Order through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the federal contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may, through its attorneys: (1) initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or (2) refer the matter to the Department of Justice for action by the Attorney General.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an Administrative Law Judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ’s decision, it may appeal the decision to the Department of Labor’s Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that the contractor or subcontractor has violated the Executive Order, it may order the contractor or subcontractor to provide appropriate relief, which may include restoration of back pay and employment status and benefits for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions.

If the contractor or subcontractor is dissatisfied with the Board's decision, it may appeal that decision to the federal courts.

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## **Relation to State, Local, and Other Federal Laws**

OFCCP generally refers individual complaints alleging discrimination based on race, color, religion, sex, or national origin to the Equal Employment Opportunity Commission ([www.eeoc.gov](http://www.eeoc.gov)) for investigation and resolution.

The Executive Order and its implementing regulations apply only to the specific state or local government entities that participate in work on or under a federal contract or subcontract. This coverage is narrower than that which applies to private sector employers.